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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 15

CLARENCE DeBACKER,
Appellant,

v.

HOMER BRAINARD,
Sheriff of Dodge County, Nebraska,
Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEBRASKA

MOTION OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

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MOTION OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

The National Council of Juvenile Court Judges* moves the Court, pursuant to Rules 35 and 42(3), for leave to file a brief *amicus curiae.* For supporting grounds the *amicus* states that:

1. Appellant has refused consent for the filing of an *amicus curiae* brief by the Council.

2. The National Council of Juvenile Court Judges is an unincorporated association. More than 1,000 of its members

*Hereinafter usually referred to as the "Council."

are judges of the various States of the Union and the District of Columbia vested with jurisdiction to determine juvenile cases. The judge members of the Council handle approximately 90% of the juvenile cases filed in the nation's courts each year.

3. A fundamental tenet of the Council is that juvenile courts are courts of law, and not social agencies. From its inception a primary concern of the Council has been that both statutory and decisional law should constantly be studied and examined, to the end that due process of law and essential fairness to the troubled children who come before the court should not be thwarted by displacing justice to the individual child with procedural simplicities which can easily lead to arbitrariness. Still, from time immemorial children have necessarily been subjected to restraints from which adults are free. As a consequence, the judges of the juvenile courts of the nation must daily deal with the practical legal problems and complexities to which this gives rise. It has therefore become the practice of juvenile court judges to seek to place at the service of legislatures and courts of last resort their collective knowledge and experience, in the hope of illuminating areas which are not always fully understood by attorneys, most of whom rarely practice in the juvenile court.

4. The Council's basic interest in this cause is that a long-tested and enlightened system for the administration of justice for juveniles, and a system which adheres to standards of fundamental fairness, not be jeopardized by an automaton insistence that the best interests, including adequate protection of basic constitutional rights, of children who are not charged with crimes can only be realized by treating them as if they were adults and so charged.

5. The broader interests of the Council are fortuitously allied with the understandably more specific concerns of the appellee in this case. This does not suggest or imply, however, that the *amicus* espouses any position on the more narrow question of the absolute correctness of the

adjudication of delinquency involved in this case. The *amicus* appears in this Court solely for the purpose of attempting to present the collective knowledge and experience of its members on issues of obvious importance to the future operation and development of juvenile court justice in the United States.

6. The *amicus* also suggests that the troublesome issues, and possibly far-reaching consequences that may flow from resolution of those issues, which the Court is asked to decide in this case are not ripe for final determination on the basis of the record now before the Court. It appears that the points which the *amicus* raises in this regard have not been and will not be argued by either the appellant or appellee.

7. First, *Duncan v. Louisiana*, 391 U.S. 145 and *Bloom v. Illinois*, 391 U.S. 194, the major cases on which the appellant most strongly relies to support his claim of a jury trial under the Sixth Amendment, as now incorporated in the Fourteenth Amendment, were decided subsequently to the juvenile court hearing and verdict in this case. In *DeStephano v. Woods*, 392 U.S. 631, this Court held that its rulings in *Duncan* and *Bloom*, *supra*, on which the appellant stands, are not to be given retroactive application, so far as jury trials in adult criminal courts are concerned. It is, then, unlikely that the Court would wish retroactively to extend application of the principle of those two cases to a juvenile court hearing and adjudication occurring before they were decided after refusing to give them retroactive effect in criminal trials generally.

8. Secondly, it would appear that the question of the prosecutor's discretion not to institute proceedings in an adult criminal court was not considered by the Nebraska Supreme Court and, therefore, should not now be considered by this Court on the basis of the barren record below. Moreover, it also may be that under Nebraska law, the exercise of prosecutor discretion of which appellant complains is subject to judicial review.

9. The *amicus*, therefore, believes that the integrity of this Court's appellate jurisdiction would be best served by vacating the order noting probable jurisdiction and remanding the case to the Supreme Court of Nebraska. Certainly, the important questions which the appellant prematurely presses upon it for decision in this case will return to the Court for resolution in the near future. It will be time enough then to decide them, especially under circumstances where their resolution can be achieved in the context of a full record, unmarred by possible jurisdictional deficiencies, including the troublesome issue of the non-retroactive application of constitutional decisions, and a record which at the same time could present a comprehensive exposition of the impact of any decision of such issues by the Court on the administration of the juvenile court systems of the nation.

10. Should, however, the Court move to a decision on the issues presented by the appellant, the *amicus* urges that the twin goals of affording due process in juvenile court proceedings and at the same time preserving the reformative and rehabilitative goals of modern juvenile court systems can best be achieved by not requiring a jury trial in juvenile proceedings and by not denying a prosecutor the discretion to elect to proceed against a child as a juvenile and not as a criminal.

11. Counsel for the appellee have advised the *amicus* that they do not oppose this motion. Counsel for the

appellant has stated that he reserves the right to object to it.

Respectfully submitted,

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Appellee.

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BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

INTRODUCTORY STATEMENT

The facts of this case, the pertinent Nebraska statute, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the appellant and appellee. The *amicus* accepts them for purposes of its own motion and brief.

QUESTIONS PRESENTED

A. *The Issues Raised by Appellant.* The appellant poses three questions, all of which he alleges to be of constitu-

tional dimension. The *amicus* deals with only two of the three issues thus raised by the appellant.[1] Restated in the order in which *amicus* will discuss them in this brief and paraphrased purely for the purpose of succinctness, these two issues are:

1. Do the Fourteenth and Sixth Amendments to the Federal Constitution require a trial by jury of a juvenile in a juvenile court for an offense which, if committed by an adult, would require a jury trial if requested?

2. Does the Due Process Clause of the Fourteenth Amendment prohibit prosecutors from exercising a discretion, not judicially reviewable, to determine that a juvenile shall be tried in a juvenile court rather than bringing criminal proceedings against him in an adult court?

B. *Two Additional Questions.* In addition to the above stated questions, the *amicus* suggests that there are two

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[1] The *amicus* does not speak to the burden of proof issue, the second of the three questions presented by the appellant. First, the constitutional aspects, if any, of this issue somewhat elude us, obscured as they are by differences which may be more semantic in nature than true distinctions of fact or result. Secondly, the *amicus* understands the burden of proof standard to be a rule of procedure and evidence, not a constitutional requirement. See *Davis v. United States*, 160 U.S. 469, 488 and *Leland v. Oregon*, 343 U.S. 790, 797. Thirdly, the Supreme Court of Nebraska has demonstrated that it will utilize its authority to review the sufficiency of evidence to support an adjudication of delinquency to preserve the presumption of innocence in favor of the alleged delinquent and will require a showing of the "moral certainty" of the juvenile's guilt. *Guy v. Doeschot*, 183 Neb. 557, 162 N.W.2d 524, 525 (1968), a case decided by the Nebraska Supreme Court subsequently to its decision in this case. The appellant in the case at bar, however, chose to follow the *habeas corpus* route rather than taking a direct appeal from the ruling of the juvenile court and thus never raised the sufficiency of evidence issue in the Supreme Court of Nebraska. Finally, if the *amicus* is correct in maintaining that the substantive issues regarding jury trial and prosecutor's option are not ripe for determination by the Court on the present record, the burden of proof question becomes even more unsubstantial as a constitutional question meriting a decision by the Court at this time and in this case.

other issues, both quasi-jurisdictional in nature, which the Court might first desire to resolve. Neither was considered below, but both, we believe, are threshold questions upon which the Court should pass before it takes up the substantive issues raised in the appellant's brief. The two questions are:

1. Whether the right to trial by jury, as guaranteed by the Sixth Amendment and now extended to state court criminal proceedings by virtue of this Court's decision in *Duncan v. Louisiana*, 391 U.S. 145, should be applied *retroactively* to a juvenile court proceeding which was commenced, decided and the available avenue of direct review from which had been deliberately not pursued, prior to May 20, 1968, the date of the *Duncan* decision?

2. Should the issue of the prosecutor's election to proceed against a child as a juvenile in a juvenile court, rather than as a criminal in an adult criminal court, be decided on the basis of the present record, when the Nebraska Supreme Court did not pass upon the issue, where the point loses any potency it might otherwise possess if the Court should agree that the doctrine of *Duncan v. Louisiana, supra*, should not be retroactively applied, and where the exercise of such discretion by the prosecutor might have been subject to judicial review under a state statute which appellant, however, did not invoke?

SUMMARY OF ARGUMENT

I.

Appellant asks this Court to apply the jury trial right in adult criminal causes first enunciated on May 20, 1968, in *Duncan v. Louisiana*, 391 U.S. 145, to this juvenile hearing which transpired some two months prior to the decision in *Duncan*. *Amicus* maintains that the decision of this Court on June 17, 1968 in *DeStefano v. Woods*, 392 U.S. 631 (1968) is an absolute bar to the retroactive application of *Duncan* not only in criminal proceedings but in this juvenile action as well. In support of that position, it is argued

that it would be both unjust (to adult criminals) and anomalous for juveniles to be afforded constitutional rights in a juvenile proceeding to which they would not have been entitled if they had been tried in the criminal courts as an adult. Further, the basic standards upon which the issue of retroactivity turns clearly dictate non-retroactive application of any jury trial right found to exist. Finally, to announce the retroactive existence of a right to a jury trial would constitute a heavy and unnecessary blow to those thirty-four or more states which until now, in good faith reliance upon their constitutional right to do so, have denied juveniles a jury trial in juvenile court.

II.

A. The juvenile court should not be converted into just another inferior criminal court, negating the hope and the promise which motivated its creation and has stimulated its development. To enforce, in juvenile courts, all of the constitutional safeguards now existing for adults in criminal courts would be an unnecessary, undesirable and wholly unwarranted nullification of the rehabilitative ideal which permeates the juvenile court. The power of the state to control the conduct of children exceeds the scope of its authority over adults. *Ginsberg v. New York*, 390 U.S. 629, 638. Surely, then, juvenile courts can be maintained as courts of fairness as well as equity without the whole-scale assimilation of constitutional rights applicable in adult criminal proceedings. *In Re Gault*, 387 U.S. 1, 30, points the way, which is by the selective absorption into the juvenile court of only those constitutional rights which are so fundamental as to be indispensable to our scheme of ordered liberty. *Kent v. United States*, 383 U.S. 541, 562.

B. Due process is both a phrase and a fact. Its factual content is derived from a realistic appraisal of those rights which are so fundamental as to be of the essence of the American system of justice. The meaning of due process is illumined by an examination of the practices and policies which have become accepted by tradition and usage through-

out the states, *Duncan v. Louisiana*, 391 U.S. 145. On this analysis, the right to trial by jury is not so fundamental as to be required in the juvenile court. Thirty-four states currently operate their juvenile courts in the absence of a right to a jury trial. Even in those where the right is recognized, it is weakened by a non-usage approaching non-existence. *Juvenile Delinquents: The Police, State Courts, and Individualized Justice* (Note), 79 Harv. L. Rev. 775, 793-794 (1966).

Recent studies indicate that the jury is not demonstrably more able to arrive at just decisions under law than a judge acting as fact-finder and legal arbiter. Kalven and Zeisel, The American Jury 56 (1966). Nor has the jury been proved, in this age and place, to be in any other meaningful way a genuine, rather than a semantic, bulwark for the juvenile accused of criminal conduct against oppression, governmental or otherwise. It is not necessary to join forces with those who are broadside detractors of the right to trial by jury to recognize the weaknesses of the somewhat less than persuasive and undeserved plaudits of which the jury trial system is so often the benefactor.

Jury trials are required, by dint of *Duncan, supra,* in adult criminal proceedings for serious crimes. Like due process, the meaning of serious crimes is somewhat inexact and elusive. In one age, a serious crime is one punishable by a death without the right to burial. In another, it is one punishable by torture and cruelty. In our time, the seriousness of a punishment is not measured alone by the maximum duration of imprisonment. Penalties must be viewed in terms of alternatives. If the stigma of criminality is to some extent minimized, the severity of the punishment is reduced. If the adult criminal process would exact a heavier toll of incarceration than the juvenile court, then the severity of the juvenile process is lessened. And if the juvenile court's mechanism is not reasonably susceptible to the application of the petty-serious crime dichotomy, then it should not be introduced there. It is the *amicus'* position that the logic which has given the jury trial right a

commanding place in criminal cases is inapplicable in the context of the juvenile court in view of the nature of that court, its dispositional alternatives and the debatable merits of the jury trial right itself.

C. A decision announcing the existence of the right to trial by jury in juvenile court will immediately put in question other concomitants of the right to trial by jury, such as the necessity for a unanimous verdict of such a jury. *DeStephano v. Woods*, 392 U.S. 631; *Bloom v. Illinois*, 391 U.S. 195, 213 (Fortas, J. concurring). Rather than clarifying the status of constitutional rights in state juvenile courts, such an outcome would becloud the conduct of those proceedings even more, to the detriment of the court and, ultimately, the juvenile himself. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 192.

It is also very likely that to equate the juvenile court with a criminal trial for the purposes of incorporating constitutional rights will raise a host of issues concerning other processes, resulting in loss of liberty, like mental commitment procedures and dependency hearings, which will put such procedures either in doubt or in jeopardy.

Without offering any discernible benefit to the juvenile, trial by jury will inevitably result in a restructuring of the juvenile court after the criminal law model, with an infusion of time-consuming and expensive procedures which will delay the court, encourage strategic byplays by counsel and frustrate the efforts of the juvenile court to avoid fastening a stigma of criminality on the juvenile and upon its proceedings.

III.

A. Neither the trial court nor the Supreme Court of Nebraska passed upon appellant's contention that he was denied due process of the law when the prosecutor exercised an unreviewable discretion not to charge him as a criminal but to proceed against him in the juvenile court.

Appellant devoted *one* paragraph of his brief in the Supreme Court of Nebraska to this contention. *Cf. Beck v. Washington*, 369 U.S. 541, 553. His challenge to the prosecutor's discretion to waive criminal charges in favor of juvenile court proceedings transcends issues involving the administration of juvenile court justice and touches much broader areas of the permissible discretion of a prosecutor to institute, to reduce, or to not prosecute criminal proceedings generally. *Amicus* believes that the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which might support the announcement of a wide ranging new constitutional principle. *Powell v. Texas*, 392 U.S. 514, 521. The *amicus* suggests that, in view of the barren record made in the courts below and the importance of the issue which the Court is asked to resolve, the notation of probable jurisdiction in this case be treated as a grant of a writ of certiorari on the issue of the prosecutor's discretion and that the Court then dismiss the writ as improvidently granted. *Mishkin v. New York*, 383 U.S. 502, 512-514.

B. A statute of Nebraska provides that a judgment or order of an "officer exercising judicial functions" may be reviewed in the district court. Section 25-1901, Rev. Stat. of Neb. (1964). The statute has been construed to cover the actions of executive or administrative officials. *Pollack v. School District*, 54 Neb. 171, 74 N.W. 393 (1898). Under appellant's own analysis, the prosecutor was an "officer exercising judicial functions." Accordingly, his decision to proceed in the juvenile court, rather than in an adult criminal court, was reviewable under the statute cited. The appellant did not invoke that statute.

IV.

Appellant's claim that the prosecutor's decision to proceed against him in juvenile court offended due process is a singularly unique contention. The reported precedents dealing with the waiver question all involve challenges to a procedure through which a child was made subject to adult

criminal justice, rather than being proceeded against in a juvenile court. See, *e.g.*, *Kent v. United States*, 383 U.S. 541. The *amicus* agrees that a decision by which a child is made to stand trial in an adult criminal court is "in essence, a sentence of 'death' as a juvenile, with the subsequent proceedings in the criminal court completing the execution." Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 Ind. L.J. 583, 588. Here, the appellant complains because he was spared such a sentence. However, he takes pains to argue that if he had a right to a jury trial in the juvenile court, an unreviewable discretion on the part of the prosecutor to charge him in the criminal court would have been challenged on the ground that a juvenile should not be deprived of the dispositional advantages of the juvenile court "because of the prosecutor's whim."

Amicus believes the appellant's sophistical position on this issue is a reflection of his counsel's judgment that he might have won the case before a jury. We do not believe that due process requirements should be diluted, if not debased, by pressing them into service as substitutes for arguments or appeals attacking the sufficiency of evidence supporting a verdict – a contention which the appellant eschewed when he chose to proceed by *habeas corpus*, rather than by direct appeal ultimately to the Supreme Court of Nebraska, as he could have done.

A number of states give concurrent jurisdiction over juveniles to their criminal and juvenile courts. The Attorney General of the United States is given discretionary authority, analogous to that involved in this case, by the Federal Juvenile Delinquency Act, 52 Stat. 557 (1948); 18 U.S.C. 5032 (1969). The Attorney General's authority has been sustained in several cases. See, *e.g.*, *Raimirez v. United States*, 238 F. Supp. 763, 764 (S.D. N.Y., 1965). The purpose of the Federal Juvenile Delinquency Act is the same as that which underlies the Nebraska statute challenged on this appeal, *i.e.*, to "avoid prosecution of juveniles as criminals." *Cotton v. United States*, 355 F.2d 480,

481 (C.A. 10, 1966); *Miller v. Bryant*, 94 Neb. 754, 144 N.W. 804 (1913).

We find nothing in *Kent v. United States*, 383 U.S. 541, which throws doubt on the type of discretion which the prosecutor exercised in this case. In *Kent* the Court was dealing with a situation in which a child was charged as a criminal to be tried in a criminal court, not, as in the instant case, reviewing a decision in favor of treating a child as a juvenile rather than as a criminal. Secondly, it is doubtful that *Kent* is a case of constitutional dimension. 383 U.S., at 556. Even if it must be taken as a decision with constitutional overtones, the Court there was confronted with the interpretation of a statutory provision which laid a judicial, or at least a quasi-judicial, function on a judicial tribunal, *i.e.*, a determination by a juvenile court "after full investigation" to waive its "exclusive jurisdiction." 11 D.C. Code 907, 914 (1961). It is well settled law that, where a quasi-judicial proceeding or hearing is required by statute as a prelude to an adjudication affecting legal rights, the procedures observed must observe due process. *Morgan v. United States*, 304 U.S. 1, *Greene v. McElroy*, 360 U.S. 474. Nebraska, however, has not vested any authority in its juvenile courts to waive jurisdiction; it permits juvenile court jurisdiction to exist concurrently with that of the regular criminal courts. Election of the jurisdiction in which to proceed against a juvenile remains an executive or prosecutor's responsibility.

Amicus believes it would be an unjustified and invidious extension of the *Kent* case to maintain that it requires the exercise of a prosecutor's discretion in choosing to proceed against a child in a juvenile court either to be preceded by some type of quasi-judicial hearing or else be subject to subsequent judicial review. If the *amicus* is wrong in that reading of *Kent*, and the discretion exercised by the prosecutor in this case be made subject to judicial review, then other, even more critical, categories of prosecutor's discretion traditionally thought to be immune from judicial scru-

tiny will be exposed to such scrutiny. We do not share the concern of a distinguished commentator that the *Kent* decision might be regarded as a portent looking "toward such radical innovation as to implant an adversary hearing in all decision-making that may work 'a result of tremendous consequences' to individuals in respect to their freedom . . . ." There are others, however, who would move the Court in precisely that direction: Davis, Discretionary Justice, A Preliminary Inquiry (La. State Univ. Press, 1969).

Awesome consequences could ensue should this Court extend the ruling in *Kent* to strike down the discretion which the prosecutor has exercised in this case. Surely, there are limits to "government by lawsuit." There is a practical, as well as a philosophical, basis for the separation of powers doctrine. *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270. To uphold appellant's contention that the prosecutor could not decide to treat him as a juvenile, rather than as a criminal, unless he held a hearing before so deciding or his decision be made subject to subsequent judicial review, is to cut away severely at both bases of the doctrine.

ARGUMENT

I.

NO JURY TRIAL RIGHT EXISTED AT THE TIME OF THE HEARING IN THE JUVENILE COURT

Appellant was not entitled to a jury trial at the time of his juvenile court hearing because: *Duncan v. Louisiana*, 391 U.S. 145, had not yet been decided; the later decision in *DeStefano v. Woods*, 392 U.S. 631, precludes the retroactive application of *Duncan*; the juvenile courts of thirty-four or more jurisdictions were at the time of appellant's hearing justifiably relying on their right to deny a jury trial to juveniles in juvenile courts; and appellant was not at the time of his juvenile court hearing thus entitled to a jury trial if tried as an adult in a criminal court.

It is clear, since this Court's decision in *Duncan v. Louisiana, supra,* that the Sixth Amendment's right to trial by jury in criminal prosecutions is binding upon state criminal proceedings, at least where they are of a serious character. In light of *DeStefano v. Woods, supra,* it is also indisputable that the decision in *Duncan* will apply prospectively only. This Court, in *DeStefano,* defined the meaning of prospectively in such a way as to give the rule in *Duncan* force only as to criminal trials begun on or after May 20, 1968—the date of the decision in *Duncan.*

Counsel for the appellant bases his argument for a reversal of the holding of the Nebraska Supreme Court almost exclusively upon the Court's opinions in *Duncan* and in *Bloom v. Illinois,* 391 U.S. 194. As expressed in appellant's brief, it is argued that he has a right to a jury trial in the juvenile court since "the offense is one which would give rise to a constitutional right to trial by jury if committed by an adult and triable in an adult criminal court." However, *DeStefano v. Woods,* 392 U.S. 631 (1968), in denying retroactive effect to a jury trial in criminal actions, effectively destroys the underpinnings of appellant's argument for a right to trial by jury in juvenile proceedings. *DeStefano* leaves no room for doubt that at the time of appellant's juvenile court hearing he had no constitutional right to a trial by jury in an adult criminal proceeding.

The record of the appeal reveals that all of the prior relevant proceedings occurred prior to the coming of *Duncan* and *Bloom.* The date of the offense charged to appellant was January 26, 1968 (A. 1);[2] the date of the petition in the Juvenile Court of Dodge County was February 15, 1968 (A. 1); the date of the Juvenile Court's adjudicatory hearing was March 28, 1968 (A. 3); the date of the Juvenile Court's order adjudicating appellant a delinquent was March 29, 1968 (A. 17); the date of the filing of the *habeas corpus* petition was April 3, 1968 (A. 18); and it was denied on April 10,

[2]References to the appendix containing the printed-record filed in this Court are designated herein as "(A. ___)."

1968 (A. 21). Thereafter, on May 20, 1968, this Court decided *Duncan* and *Bloom*, *supra*, both of which, as has been said, were determined in *DeStefano v. Woods* not to be retroactive in application. Consequently, the non-retroactivity of the right to a jury trial in a criminal cause should induce this Court to refrain from declaring that right to apply retroactively to a juvenile cause which preceded the date of its decisions in *Duncan* and *Bloom*.

The criteria to be employed in determining whether a newly established constitutional right is to be enforced retroactively were stated in *Stovall v. Denno*, 388 U.S. 293, 297, to be:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

It is to be noted, as Mr. Chief Justice Warren did in *Johnson v. New Jersey*, 384 U.S. 719, 728, that "the choice between retroactivity and non-retroactivity in no way turns on the value of the constitutional guarantee involved." And a failure to apply a constitutional rule retrospectively is not a denigration of any intrinsic or fundamental value that it might have in our constitutional system.

Under any reasonable analysis of these norms for determining retroactivity, the jury trial right should not be applied retroactively to this juvenile matter. The purpose of the right to a jury trial which derives from *Duncan* and *Bloom* cannot simply be to achieve an abstract state of justice. The right to a jury trial has attributes and vitality in the real world of criminal prosecutions and often, as in this cause, an impact to match. The facts in this case reveal no patent injustice to the appellant resulting from having the juvenile court judge act as the fact finder. In other words, "the fairness of the trial is not under attack." *Linkletter v. Walker*, 381 U.S. 618, 639.

An adjudicatory hearing was held at which testimony was introduced concerning the circumstances of the alleged

offense. An effort was made to divorce the adjudicatory phase from matters relating to the proper disposition of appellant. The juvenile court judge manifestly attempted, in a conscientious way, to ascertain whether the allegations of the petition were proved. There is, therefore, no self-evidently gross prejudice resulting from the lack of a jury trial in the juvenile court proceedings which needs to be righted by a retroactive application of the right to a jury trial to this cause and, as an inevitable consequence, to all other juvenile proceedings anywhere decided prior to *Duncan* and *Bloom*.

Furthermore, the impact upon the administration of juvenile justice from such retroactivity would be enormous. It should be a matter of some moment that many retrials, necessitated by such retroactivity, would not be feasible because juvenile court jurisdiction, in consonance with the *parens patriae* theory often considered to be its chief warrant, generally terminates when the juvenile reaches 21 years of age. Consequently, retrials in the juvenile court, with a jury, would be precluded in such cases. The available options, under such a situation, would be to dismiss the charges against those juveniles denied a jury trial who are above the age of twenty-one or to try them in a criminal court. Pursuit of the latter alternative might be prevented by a fear of the application of the Fifth Amendment's double jeopardy clause and, in other cases, barred because of a state's having given exclusive jurisdiction to a juvenile court over persons who at the time of an offense were under twenty-one years of age.

In addition, it is extremely important to be aware of the heavy reliance that the states' juvenile courts have heretofore placed upon their right to try juveniles in delinquency cases without a jury and without thereby infringing a juvenile's constitutional rights. A study of the statutes and judicial opinions on this question in the various states[3] indi-

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[3]At pages 12 and 13 of appellant's brief a student note from the Winter 1969 issue of the North Dakota Law Review is cited as

cates that thirty-four states at present clearly and definitively deny the juvenile a right to a jury trial in cases such as this.[4] Some twelve other jurisdictions (including the District of Columbia) grant that right, but then only upon

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authority for the proposition that 12 jurisdictions grant and 27 deny the right to a jury trial. However, that student note is too often incomplete or inaccurate for a firm reliance to be placed upon it. For example, it cites an Alaska statute for the proposition that a jury trial is permitted, when that statute explicitly denies such a jury trial. It fails to cite the relevant South Carolina statute and miscites the Colorado, Hawaii, West Virginia and New York statutes. *Amicus* has therefore made its own tabulation of the statutes and decisions, set out in the next footnote, which does not, however, embrace a thorough review of those states where an appeal might result in a trial *de novo* with a right to a jury trial. See, *e.g.*, Ann. Laws Mass., Ch. 119, Sec. 56 (1958).

[4] By statute in: Ala. Code Tit. 13, Sec. 369 (1969); Alaska Stat. 47.10.070 (1968 Supp.); Ariz. Rev. Stat. Ann., Sec. 8-229 (1956); Ark. Stat. Ann., Sec. 45-206 (1964 Repl.); Del. Code Ann. Tit. 10, Sec. 1175 (1966 Supp.); Fla. Stat. Ann. 39.09(2) (1961); Ga. Code Ann., Sec. 24-2420 (1959); Hawaii Rev. Stat., Sec. 571-41; Gen. Laws Idaho Ann., Sec. 16-1813; Ind. Ann. Stat., Sec. 9-3215 (1967 Burns' Supp.); Iowa Code Ann. 232.27 (1969 Supp.); Ky. Rev. Stat., Sec. 208.060 (1962); La. Rev. Stat. Ann., Sec. 13:1579 (1968); Minn. Stat. Ann., Sec. 260.155(1) (1967 Supp.); Miss. Code Ann., Sec. 7185-08 (1942); Vernon's Ann. Mo. Stat., Sec. 211.171(6) (equity practice controls); Neb. Rev. Stat., Sec. 43-206.03(2) (1943); Nev. Rev. Stat., Sec. 62.190(3) (1963); N.J. Stat. Ann. 2A:4-35 (1963); McKinney's Consol. Laws N.Y., Family Court Act 164, 165 and Civ. Prac. Law and Rules 4101; N.D. Century Code, Sec. 27-16-18 (1967 Supp.); Page's Ohio Rev. Code Ann., Sec. 2151.35 (1968 Repl.); Ore. Rev. Stat., Sec. 419.498(1) (1967 Supp.); Purdon's Pa. Stat. Ann., Tit. 11, Sec. 247 (1954); Code S.C. Laws, Sec. 15-1095.19 (1968 Supp.); Utah Code Ann., Sec. 55-10-94 (1967 Supp.); Vt. Stat. Ann., Tit. 33, Sec. 651(a) (1968 Supp.); Rev. Code Wash. Ann., Sec. 13.04.030.

By judicial decisions in: Calif.: *In Re Daedler*, 194 Cal. 320, 228 P. 467 (1924); Conn.: *Cinque v. Boyd*, 99 Conn. 70, 121 A. 678 (1923); Md.: *In Re Fletcher*, 251 Md. 520, 248 A.2d 364 (1968); Mass.: *Comm. v. Page*, 339 Mass. 313, 316, 159 N.E.2d 82, 85 (1959) (*dictum*); *Marsden v. Comm.*, 352 Mass. 564, 227 N.E.2d 1, 2 (1967) (*dictum*); N.C.: *In Re Watson*, 157 N.C. 340, 72 S.E. 1049 (1911); *State v. Burnett*, 179 N.C. 735, 102 S.E. 711 (1920); N.H.: *In Re Perham*, 104 N.H. 276, 184 A.2d 449 (1962).

demand.[5] Of the remaining five states, it is very probable that four of them would not grant a jury trial if the question were directly raised for decision.[6]

Admittedly, the customs and usages of even a substantial number of states should not be of controlling weight when great constitutional rights are at stake. But here the issue of retroactivity does not reach the level of constitutional concern. It is more a matter of practicalities in this Court's ordering of newly enunciated or more broadly expanded constitutional rights. Yet, even if it were otherwise, as Mr. Justice Clark once said,

> "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of

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[5]By statute in: Colo. Rev. Stat. Ann. 22-8(1); Kan. Stat. Ann. 38-808 (1968 Supp.) but here the Juvenile Court merely refers the issues to another tribunal for a jury trial and then it is returned for disposition to the Juvenile Court; Mich. Stat. Ann., Sec. 27.3178 (598.17); Rev. Codes Mont., Sec. 10-603 (1947); Okla. Stat. Ann., Tit. 10, Sec. 1110; S.D. Code (1939), Sec. 43.0331 (but only the court may order a jury of six); Vernon's Ann. Rev. Tex. Stat., Art. 2338-1, Sec. 13(b); W.Va. Code Ann., Sec. 49-5-6; Wis. Stat. Ann., Sec. 48.25(2) (1957); Wyo. Stat. Ann., Sec. 14-108(c) (1961); D.C. Code Ann., Sec. 16-2307.

By judicial decision in: *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

[6]In Virginia, *amicus* is advised that the current practice opposes a jury trial. See, in general, Code Va. Ann., Sec. 16.1-162 (1950). In Maine, the statute stipulates an informal juvenile court hearing. Me. Rev. Stat. Ann., Sec. 15-2610. In Illinois, the earliest act provided for a jury but the latest revision makes no mention of the matter. In Tennessee the earlier right to a jury trial statute was repealed in 1955 and its replacement does not mention the issue. In Tennessee the earlier right to a jury trial statute was repealed in 1955 and its replacement does not mention the right. Tenn. Code Ann., Sec. 37-244. Finally, in Rhode Island, the most recent statutory amendment has replaced the direct prohibition of a jury with silence. Gen. Laws R.I., Sec. 14-1-30 (1967 Supp.).

justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[7]

It appears to the *amicus* that it would be of dubious merit for the Court to overturn such an established practice throughout the overwhelming number of states. However, to do so retroactively would be a severe blow to those thirty-four or more states which have relied on their right to try juveniles without a jury trial. And this "point of reliance is critical . . . because it determines the impact that newly articulated constitutional principles will have upon convictions obtained" under practices "not previously proscribed." *Jenkins v. Delaware,* ___ U.S. ___, 23 L. Ed. 2d 253. Of course, it goes without saying that the reliance of juvenile courts, prior to *Duncan,* on their right to try juveniles without a jury was in complete good faith and wholly justifiable.

Further, even the juvenile court decisions in those twelve jurisdictions which do permit a jury trial upon demand could be adversely affected by an application of *Duncan* to this cause. It is not at all fanciful to suppose that, in those states, juveniles who did not demand a jury trial might now contest their confinement on the premise that their right to a jury trial is an affirmative right of which they must be given notice by the juvenile court and a waiver of that right cannot be deduced from their unknowing failure to demand a jury trial.

There are other persuasive arguments against applying the right of a jury trial retroactively to juvenile proceedings held prior to *Duncan* and *Bloom, supra.* Recently, and quite frequently, this Court has reviewed the question of whether newly enunciated or expanded constitutional standards should be given retroactive effect. With but an occasional exception,[8] the decisions of this Court have denied

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[7] *Leland v. Oregon,* 343 U.S. 790, 798.

[8] *Jackson v. Denno,* 378 U.S. 369; *Griffin v. Illinois,* 351 U.S. 12; *Gideon v. Wainwright,* 372 U.S. 335.

the retroactive applicability of newly articulated constitutional commands. The refusal in the *DeStefano* case to apply the jury trial retroactively is only one of these. The exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, was not applied retroactively in *Linkletter v. Walker*, 381 U.S. 930. Nor was the Fifth Amendment's privilege against self-incrimination, *Tehan v. Shott*, 382 U.S. 406, or the right to counsel at a line-up, *Stovall v. Denno*, 388 U.S. 293. Similarly, this Court's landmark holdings in *Escobedo v. Illinois*, 370 U.S. 478, and *Miranda v. Arizona*, 384 U.S. 436, were held to have prospective effect only in *Johnson v. New Jersey*, 384 U.S. 719. Again, *Lee v. Florida*, 392 U.S. 378, was denied retroactive effect in *Fuller v. Alaska*, 393 U.S. 80. And in *Kaiser v. New York*, 394 U.S. 280, this Court refused retroactive effect for its decision in *Burger v. New York*, 388 U.S. 41. The same was true for the constitutional right upheld in *Katz v. United States*, 389 U.S. 347. See *Desist v. United States*, 394 U.S. 244. Finally, it may be of importance to note that at least one state court has thus far held that the jury trial rights bestowed by reason of this Court's decision in *Duncan* and *Bloom, supra*, are not, as a consequence of its later holding in *DeStefano v. Woods, supra*, to be applied retroactively to juvenile court proceedings prior to May 20, 1968. *In Re J.F.*, 74 Cal. Rptr. 464 (Ct. App., 1969).

Conceivably, the non-retroactivity rule may be avoided by asserting that the cause was pending in the form of review by *habeas corpus* petition at the time of the decision now claimed to be binding. *Linkletter v. Walker, supra*. However, the posture of this case is such that an argument of this kind is totally inapposite. Counsel for appellant chose to challenge the Nebraska Juvenile Court Act's non-jury provision through the collateral device of a *habeas corpus* petition. There was, however, an available appellate remedy first to the District Court (Neb. Const. Art. V, Sec. 17) and then to the Nebraska Supreme Court (Neb. Const. Art. I, Sec. 24; Sec. 25-1912, Rev. Stat. of Neb. (1964), both of which counsel for the appellant chose not to pursue.

Anomalies abound in the law, but they should not needlessly be encouraged. Indeed, "it is incumbent upon this Court to endeavor to keep such incongruities to a minimum." *Jenkins v. Delaware, supra,* at 262 (Harlan, J. dissenting). It is believed that a decision in this cause applying the right to trial by jury retroactively in juvenile cases would create more than a logical incongruity. The arguments now proliferating over the constitutional procedural aspects of a juvenile proceeding are primarily between those who maintain that a juvenile court should be bound by the same constitutional standards to which the juvenile would have been entitled if he had been tried as an adult in a criminal court and those who argue that there is a distinction, not without a difference, between the juvenile court's operations and objectives and those of a criminal court, which difference justifies the application of different constitutional standards in each court. However, no one has as yet asserted, or even suggested, that juveniles before the juvenile court are entitled to more constitutional protections than their criminal court counterparts. In fact, retroactive application of *Duncan* and *Bloom* in this case would establish such an anomalous result. Adult criminals tried prior to May 20, 1968, cannot claim a right to a jury trial, but juveniles adjudicated as delinquents prior to that date could. It is submitted that such an incongruity and even an injustice—to adult criminals—should not be permitted.

In further reply, the appellant might argue that the nonretroactivity of *Duncan* and *Bloom; supra,* should not control appellant's right to a jury trial since *DeStefano* only spoke to the issue of retroactivity in connection with criminal trials, whereas appellant seeks a jury trial in a juvenile cause. This would be an especially strange and unpersuasive argument for appellant to assert. Throughout he has attempted to analogize his juvenile trial to the trial of an adult for a criminal offense. At this late date, his position would not be improved by such an abrupt about-face in his reasoning. Moreover, it seems evident that this cause is factually and legally very close to the situation which con-

fronted the Court in *DeStefano*. In both cases it is proposed to apply a right to a jury trial retroactively and in so doing also to extend it beyond the limits of *Duncan* and *Bloom*. *DeStefano* involved an effort to expand the jury trial right so as to require a unanimous jury verdict for a conviction. A parallel type of expansion is suggested by appellant, *i.e.*, to extend the jury trial right in criminal causes to juvenile proceedings. The distinctions existing between *Duncan* and *DeStefano* and those existing between this cause and *Duncan* are of no relevance since the basic issue is the same—shall the jury trial right be applied retroactively? We believe it clear that such retroactivity is not justified.

Amicus recognizes that this Court has not yet said whether *In Re Gault*, 387 U.S. 1 (1967) should have retroactive effect and the state courts are irreconcilably divided on this issue.[9] But a decision one way or the other on that matter should have no impact upon the question of retroactivity in this cause. Just as the issue of retroactivity in *Tehan v. United States ex rel. Shott, supra* (privilege against self-incrimination), was in no degree foreclosed or affected by the decision on the retroactivity of the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335, so, too, the retroactivity of a jury trial in a juvenile matter should be considered independently of the wholly distinct and different constitutional rights at issue in *Gault*.

Moreover, the situation in *Gault* is distinguishable on another ground as well. *Gault* involved, in part, the right to counsel at juvenile hearings. Before *Gault* that right had been given constitutional stature in criminal prosecutions and had been granted retroactive effect there. Here, however, *DeStefano* unequivocally articulates a policy of nonretroactivity as to the right to a jury trial. Where retroactivity is decreed in the one case, as it was in *Gideon*, it is

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[9] *Gault* held to be retroactive in *Application of Billie*, 103 Ariz. 16, 436 P.2d 130 (1968). *Contra: Cradle v. Peyton*, 208 Va. 243, 156 S.E.2d 874 (1968) and *In Re Harris*, 67 Cal. 2d 876, 434 P.2d 615, 617 (1968).

tenable to hold that juvenile causes must follow suit. Yet where retroactivity is denied, as it was in *DeStefano*, the argument for retroactivity in juvenile cases is wholly without substantive support.

Finally, it might be said, at the cost of straining appellant's own logic, that the constitutional rationale for a jury trial in a criminal prosecution is different from that which might persuade the Court to require a jury trial in a juvenile hearing. The rationale of *Gault* seems quite distinguishable from that which has moved this Court to enforce various of the provisions of the Bill of Rights upon the states in criminal cases. We believe it fair to conclude that *Gault* is predicated upon an analysis of the due process clause of the Fourteenth Amendment which necessitates a determination whether a claimed constitutional right is a matter of fundamental fairness or not. This is hardly an objective test of due process. On the contrary, the recent spate of criminal law decisions on the part of this Court has most frequently defined the due process clause more as a conduit for the bodily incorporation of the Bill of Rights. Beyond much question such an analysis of due process is somewhat more objective than that espoused by the Court in deciding *Gault*.

Although it may be conceded that the *Gault* analysis of due process requirement differs from the incorporation rationale applied in cases such as *Duncan* and *Bloom*, that is not to say that such a variance in analysis of the basis on which different constitutional rights rest justifies retroactive applicability of any right to a jury trial in a juvenile cause. Certainly, *Duncan* was decided on an incorporation theory and *DeStefano* refused to apply the consequence of that theory retroactively. But one could hardly now be heard to say that *Duncan* should be applied retroactively because there may be other justifications for the criminal trial right to a jury, the bases of which are unaffected by *DeStefano*. The *DeStefano* decision cannot, we believe, be so subtly overturned or limited.

Indeed, should such reasoning prevail, any of this Court's decisions as to the retroactivity of a new constitutional right would be in jeopardy simply by a resort to a metaphysics of constitutional interpretation which would change the substance of a constitutional holding by accidental modifications in the rationale of that holding. The criteria for determining the question of retroactivity are those stated in *Stovall v. Denno, supra.* Surely those standards are unrelated to and separate from the criteria to which the Court looks before enunciating new, or enlarging old, constitutional rights.

In view of the arguments set out in this initial section of the *amicus'* brief, it is submitted, therefore, that the Court should not enforce retroactively the jury trial right enunciated in *Duncan* and *Bloom*, in disregard of *DeStefano*, to this juvenile court proceeding. Rather, the Council respectfully suggests that the order noting probable jurisdiction in this case be vacated and appellee's motion to dismiss for want of substantial federal question be granted.

II.

DUE PROCESS DOES NOT REQUIRE THE RIGHT OF A JURY TRIAL FOR A JUVENILE CHARGED AS A DELINQUENT IN A JUVENILE COURT PROCEEDING

The *amicus* accepts the appellant's statement of the jury trial issue which his appeal attempts to present. However, it believes that this issue is best to be determined by first answering the question: Shall the meaning and scope of due process for juveniles in juvenile court proceedings be determined through the selective absorption of rights specified in the Bill of Rights or by full scale incorporation of those rights as part of the guarantees afforded by the Fourteenth Amendment? For reasons it now states, the *amicus* believes: (1) that the due process requirements which must be observed in juvenile court proceedings are to

be determined through a process of selective absorption of the rights contained in the Bill of Rights according to a standard of "fundamental fairness"; (2) that the right to a jury trial in juvenile court proceedings is not one which must be provided by virtue of any requirement of due process; and (3) that the far reaching practical consequences if a jury trial in juvenile court proceedings is required of the states furnish an additional consideration militating against the imposition of such a requirement.

A. *Fundamental Fairness Is the Controlling Criterion.* The decision in *In Re Gault*, 387 U.S. 1, the necessary operations of the juvenile court and the requirements of constitutional principle compel a holding that the only constitutional rights that should be required to be observed in the juvenile court are those that are considered to be fundamental to fairness to the juvenile.

Since the decision in *Re Gault, supra*, there has been expressed a continuing concern lest the constitutional precepts now applicable to adults in criminal proceedings be applied automatically and totally in juvenile court proceedings.[10] It seems to the Council that this anxiety is not well founded. Mr. Justice Fortas, in *Gault*, used language which unambiguously affirms that it was not the intention of the Court to transform the juvenile court into but another criminal court. As he put it, reiterating his view in *Kent v. United States*, 383 U.S. 541, 562:

> "We do not mean . . . to indicate that the hearing to be had must conform with all of the requirements of a criminal trial or even of the usual administrative hearing, but we do hold that the hearing must

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[10] Rosenheim, *Standards for Juvenile and Family Courts: Old Wine in a New Bottle*, 1 Family L.Q. 25, 28 (1967); Wheeler and Cottrell, Juvenile Delinquency: Its Prevention and Control 33 (Russell Sage Foundation 1966).

measure up to the essentials of due process and fair treatment."[11]

The *Gault* standard of due process then, at least as far as the procedures of state juvenile courts are concerned,[12] is one which asks whether the constitutional right in question is a necessary precondition to the accomplishment of fundamental fairness in a juvenile court. And in the application of this standard, it is to be recalled that *Gault* also teaches that the due process standard is to be "intelligently and not ruthlessly administered." *In Re Gault, supra,* at 21.

Admittedly, it might facilitate at least the mechanics of constitutional decision-making if the "spacious language" (*Duncan v. Louisiana, supra,* at 148) of the due process clause of the Fourteenth Amendment were construed to embrace all of the rights contained in the Bill of Rights. But this Court has never followed such a course with respect to adults charged with crimes; nor should it now as to juveniles similarly charged. If ease in decision-making is to be the talisman for the application of constitutional rights, another method is at hand. It would be possible for this Court to infuse into the juvenile court all of those constitutional protections to which adults accused of crime are entitled under the due process clause of the Fourteenth Amendment. Some few courts[13] and scholars have declared their allegiance to this view.[14] Yet this Court, in *Gault,* carefully eschewed such an uncritical and mechanical application of constitutional rights in the juvenile court. Other

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[11] *In Re Gault,* 387 U.S., at 30.

[12] *Nieves v. United States,* 280 F. Supp. 994 (S.D.N.Y., 1968) which adopts the Sixth Amendment's right to trial by jury for proceedings under the Federal Juvenile Delinquency Act.

[13] *Ibid.*

[14] Boches, *Juvenile Justice in California: A Re-evaluation,* 19 Hastings L.J. 47 (1967); Gardner, *The Kent Case and the Juvenile Court: A Challenge to Lawyers,* 52 A.B.A.J. 923, 924 (1966).

persons, both critics[15] and supporters[16] of the juvenile court alike, have espoused a similar view. Indeed, the state courts, including even the Arizona Supreme Court in *Gault*,[17] have consistently asserted that the issue is what affords fairness to the juvenile, not what are the rights to which an adult can lay a constitutional claim in criminal proceedings.[18]

This distinct and independent fairness to the juvenile criterion of constitutional rights has been developed and maintained for sound reasons. It is not necessary for us to accept the lazy logic of labels to recognize, as this Court did in *Gault, supra,* at 22, that criminal proceedings and juvenile court procedures are distinguishable in ways that should be maintained. Underlying these variants from the criminal court model, as prescribed for juveniles, is the understanding that there is a rational basis for procedural differences between juveniles charged with crime and their adult counterparts. It goes without saying that juveniles are at an age when the enticements of crime are most alluring, when their sense of right and wrong is at its peak, and when their susceptibility to reform is the greatest.

These sociological and psychological findings, among others, gave birth to, and still justify, the less formalistic procedural functioning of the juvenile court. This court, as it has evolved, has been characterized by Dean Francis Allen as "the most important and ambitious effort yet undertaken by our law to give practical expression to the rehabil-

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[15]Dorsen and Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 Family L.Q. 1, 3 (1967); Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. Law Review 547, 550 (1957); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 186.

[16]Rosenheim, *Standards for Juvenile and Family Courts, supra*; Wheeler and Cottrell, Juvenile Delinquency, *supra*.

[17]*Application of Gault*, 99 Ariz. 181, 407 P.2d 760 (1965).

[18]*In Re State in Interest of Carlo*, 48 N.J. 224, 225 A.2d 110, 116 (1966); and see cases cited at *In Re Gault, supra*, at 12, fn. 8.

itative ideal."[19] It is, therefore, unnecessary and, indeed, self-defeating for us either to invoke or to parry labels in order to justify the independent existence of the juvenile court. Whether it be called civil, quasi-criminal,[20] *sui generis* or otherwise, it is clear that:

> ". . . even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches far beyond the scope of its authority over adults . . ."[21]

It is submitted, therefore, that the applicability of a particular constitutional right in the juvenile court, when invoked under the mandate of due process, should be tested by its relevance to the standard of fairness to the juvenile within the total context of the juvenile court's quest for the rehabilitative ideal. Judged in that light, *amicus* contends that the right to trial by jury is not so fundamental to a system of ordered liberty that it must be observed in a juvenile court proceeding where the court's disposition is much less severe than the maximum possible penalty that could be imposed by a criminal court for the same offense.

B. *A Jury Trial Is Not Required.* Due process is not violated by a rejection of the jury trial in a juvenile court because the predominant practice among the states indicates that the jury trial is not so fundamental in the juvenile court as to be raised to a constitutional dimension. Nor is the jury on its own merits any more tangibly accurate than a judge in finding the facts. Finally, it is not justifiable to stigmatize the juvenile court as imposing severe penalties when the range of possible penalties in the criminal court for the same offense is far more onerous.

The critical issue, in determining whether due process requires the application of the Sixth Amendment's right to

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[19] Allen, The Borderland of Criminal Justice 48 (1964).

[20] Welch, *Delinquency Proceedings Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 Minn. L. Rev. 653 (1966).

[21] *Ginsberg v. New York*, 390 U.S. 629, 638.

a jury trial in juvenile court proceedings, is whether the right to a jury trial is so fundamental that a proceeding conducted in its absence must be said to be intrinsically unfair. This fundamental fairness doctrine has more than conceptual integrity. It has been deliberately refined and carefully honed by a long series of opinions from this Court so that it is not the elusive and ill-defined notion that, at first glance, it might appear to be. The latest and most important exposition of it which is directly pertinent to this case occurred in *Duncan, supra.* There, Mr. Justice White spoke not of fundamental fairness in the abstract but of such fairness according to the meaning "the American scheme of justice" concretely ascribes to it. Mr. Justice White went so far as to hypothesize "A criminal process which was fair and equitable but used no juries . . " *Duncan v. Louisiana, supra,* at 150, fn. 14. Yet, since "no American State has undertaken to construct such a system" (*Duncan v. Louisiana, supra,* at 150, fn. 14) such an imagined but untried system could not square with the requirements of fundamental fairness under the due process clause. At a later point in the same opinion, Mr. Justice White again emphasized that the "strong support" which the jury trial right in criminal causes had received in the laws of every state was very pertinent in determining whether it was fundamental in the American system of justice. *Duncan v. Louisiana, supra,* at 154.

It is clear, therefore, from *Duncan* and even before,[22] that due process must take into account the practices found suitable by the deliberative process of legislative and judicial action throughout the states. On that analysis, the juvenile court, as presently conducted in thirty-four states,[23] cannot be found wanting in due process by proceeding in the absence of a jury trial. It is to be recalled that the right to a jury ~~trial~~ in juvenile courts has been denied juvenile courts both by legislative action and by the appellate

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[22] *Leland v. Oregon,* 343 U.S. 790, 797.

[23] See fn. 4, 5 and 6, *supra.*

opinions in cases contesting the legislative mandate.[24] Moreover, the opinions of the scholars, with only a rarely encountered dissent,[25] oppose the incorporation of the jury trial into juvenile court proceedings.[26] The Standard Juvenile Court Act[27] and the Uniform Act[28] do not provide for it. And the recent Minnesota Juvenile Court Rules have not adopted it.[29] Nor was it viewed with approbation by the Task Force Report on Juvenile Delinquency and Youth Crime of the President's Commission on Law Enforcement and the Administration of Justice.[30]

Even those twelve jurisdictions which do permit a jury trial in juvenile matters do not make any strong case for the fundamental fairness of having a jury in the juvenile court. For example, statistics for the District of Columbia indicate that: "Only three jury trials were held between March 1, 1964 and February 28, 1966,"[31] and that in 1967,

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[24] *Dryden v. Comm.*, 4 Cr.L.Rep. 2253 (Ky. Ct. App., 1968); *Estes v. Hopp*, 73 Wash. 2d 272, 438 P.2d 205 (1968); *Comm. v. Johnson*, 211 Pa. Super 62, 237 A.2d 9 (1967). *Contra: Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

[25] Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387, 400-401 (1961). But Professor Antieau bases his judgment, in part, on an erroneous finding that "the legislatures in almost half the states" provide for a jury trial in juvenile court matters; Dorsen and Rezneck, *supra*, at 22-23; *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal* (Note), 114 U. Pa. L. Rev. 1171, 1187 (1966).

[26] Tappan, Juvenile Delinquency 211-212 (1949); Sheridan, Standards for Juvenile and Family Courts 73 (Children's Bureau, 1966).

[27] Section 19 (6th Ed. 1959).

[28] Uniform Juvenile Court Act, Section 24(a) (Natl. Conf. Comm. on Uniform State Laws, 1968).

[29] Minn. Juvenile Court Rules, Minn. Stat. Ann. Supp. 1969, foll. Chap. 260 (1969).

[30] P. 38.

[31] Report of the President's Commission on Crime in the District of Columbia 1010, fn. 41.

there were eleven jury trials and in 1968 but thirty-two.[32] In Denver, it has been said that there were two requests for a jury trial in twenty-five years.[33] The jury trial is most frequently waived[34] or requested for tactical reasons in order to induce a lesser charge or more lenient disposition from a court or prosecutor with an overcrowded docket. None of this data suffices as compelling evidence of the fundamental character of the jury trial in juvenile causes.

The debate over the merits of the jury trial in civil and criminal causes is well-known and amply documented.[35] The positions of the protagonists have at times been stated in flamboyant terms. According to former Dean Griswold, now Solicitor General of the United States: "The jury trial at best is the apotheosis of the amateur."[36] On the other hand, Lord Justice Devlin has said that "it is the lamp that shows that freedom lives."[37] The *amicus* suggests that in such exchanges there may be more rhetoric than reality in the conflicting appraisals of the value of a jury trial.

Rhetoric aside, it is still possible to define the concrete bases asserted to justify the existence of the jury trial as an essential component of the American system of justice. It is said to be effective as a fact-finding mechanism.[38] However, the recent University of Chicago jury trial study shows that judges and juries agree on the proper disposition of criminal cases in 75.4% of the cases studied.[39] This pattern

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[32] Annual Report of the Juvenile Court of the District of Columbis, Fiscal Year 1968, p. 9.

[33] *Juvenile Delinquents: The Police, State Courts, and Individualized Justice* (Note), 79 Harv. L. Rev. 775, 793-794 (1966).

[34] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 186.

[35] *Duncan v. Louisiana*, *supra*, at 156-157.

[36] 1962-1963 Harvard Law School Dean's Report, pp. 5-6.

[37] Devlin, Trial by Juty 164 (1956).

[38] Dorsen and Rezneck, *supra*, at 23.

[39] Kalven and Zeisel, The American Jury 56 (1966).

of agreement is strong evidence that juries are not significantly better equipped to find the facts than judges are. The same point has been made by some state courts in rejecting the constitutional necessity for a jury trial in juvenile courts.[40]

It has also been argued that the right to a jury trial "was clearly intended to protect the accused from oppression by the Government . . . ."[41] Yet past intentions should be read in the light of current realities. Or as Mr. Chief Justice Burger has said:

> ". . . a government bent on destroying individual liberties can do it with a jury or with a non-jury inquiry system. You can juggle any system if you've got enough power in the establishment to do it."[42]

Juries have, it has been said, a virtue in that they may "afford a higher justice by refusing to enforce harsh laws . . . ."[43] Still, the jury that is flexible or non-rule minded enough, or not sufficiently cognizant of its oath, to acquit in one case may in a later case convict on whimsy, too. "One is tempted to say that what is one man's equity is another man's anarchy."[44]

Then again, juries are said to be a buffer against the "overworked judge"[45] who will give a case the assembly line treatment, or "as a protection against jaded judges who hear case after case, day in and day out and decide on past

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[40] *Dryden v. Comm.*, *supra*, note 24.

[41] *Singer v. United States*, 380 U.S. 24, 31; *Duncan v. Louisiana*, *supra*, at 155.

[42] 1 The Center Magazine 7, November 1968.

[43] *Duncan v. Louisiana*, *supra*, at 187 (Harlan, J. and Stewart, J. dissenting).

[44] Kalven and Zeisel, *supra*, at 9.

[45] Dorsen and Rezneck, *supra*, at 23.

prejudices rather than present evidence."[46] Such generalities are more epigrammatic than informative. Whereas some juvenile judges are bound to be insensitive, others are equally certain to be compassionate and experienced. The experience of trying cases is not always a debilitating influence upon good and conscientious judges. It may also awaken in them responses and sympathies which no amount of theorizing would loose. In any event, any seasoned trial attorney knows that juries quickly become jaded, too. Witness, for example, the jockeying with the criminal trial calendar on the part of defense counsel in order to avoid the adverse impact of a trial before a jury soured by one month's experience in court. Or as Kalven and Zeisel have put it,

> "Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude."[47]

In recognition of this sometimes heated and almost never empirically valid debate, where hyperbole abounds, over the merits of the jury system, it would be anomalous to import the jury trial wholesale into the juvenile court on the theory that it is so fundamental to our way of justice as to be imperative in the juvenile court as elsewhere. Whatever the stature of the jury trial in criminal causes, this *amicus* maintains that its desirability is sufficiently debatable to lay open to question its status as a fundamental necessity required by due process in juvenile court proceedings.

Duncan makes it clear that the issue of the fundamental nature of a claimed constitutional right cannot be ascertained in the absence of an appraisal of the juridical consequences of the factual occasion into which it is asked to be

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[46] *Criminal Offenders in the Juvenile Court, More Brickbats and Another Proposal, supra,* at 1187.

[47] Kalven and Zeisel, *supra,* at 498.

introduced. In other words, the seriousness of the offense is a relevant gauge of the expansiveness of the due process requirements which must control. The facts in this case indicate that the appellant was charged, by the petition, with the crime of forgery in violation of Sec. 43-201(4) Rev. Stat. of Neb. (1964) (A. 1), and that for that offense, if tried and convicted as an adult, he could have received a sentence of confinement from one to twenty years. As it happens, however, appellant was tried in the juvenile court where the maximum term of his confinement under juvenile court jurisdiction would have to terminate upon his reaching twenty-one years of age. Unlike the factual situation in *Gault* and other cases challenging the constitutionality of juvenile court proceedings,[48] appellant received the better of both possible worlds in the consequences attaching to his juvenile court trial.

Duncan indicates that the seriousness of an offense constitutes the dividing line between the existence and the non-existence of the constitutional right to a jury trial in a criminal case. The later opinion of this Court in *Frank v. United States*, ___ U.S. ___, 23 L. Ed. 2d 162, reaffirms this position. Nevertheless, what may be properly determinative for the criminal court is not necessarily so for the juvenile court. Juvenile cases are rarely petty, if by petty is meant capable of subjecting the juvenile to a period of confinement of less than six months.[49] The severity of the offense guideline of the criminal law is inappropriate in the juvenile court. A child found to have committed even a minor offense may also be found to require commitment to a training school or some similar restriction of his liberty. Moreover, confinement is not the only measure that the community uses to illumine its view of the seriousness of an offense. Penalties have qualitative as well as quantitative

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[48] *In Re Urbasek*, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

[49] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, *supra*, at 188.

differences,[50] as is readily observed in the juvenile court and in this case in particular.

Therefore, *amicus* maintains that the logic which has given the jury trial right a commanding place in criminal cases is inapplicable in the context of the juvenile court, in view of the nature of the court, its dispositional alternatives and the debatable merits of the jury trial right itself. On balance, we believe that the jury trial right is not so fundamental as to be required in a juvenile court bound by the commands of due process.

C. *The Impact on Juvenile Court Justice Should Jury Trials Be Required.* A jury trial right in the juvenile court will necessarily give rise to other incidental issues, including matters of the scope of the *voir dire* and the proper venue of trial, and will inevitably engage the juvenile court in a formal, adversary procedure. This will involve a time-consuming, combative process sorely damaging to the rehabilitative ideal which moves that court. The incorporation of the jury trial right into juvenile courts is also likely to cast doubt upon the legitimacy of other commitment procedures of quasi-criminal character which result in subjecting persons to extended periods of institutionalized loss of liberty.

Decisions on an issue of the magnitude of that presented by this cause cannot be determined in a vacuum. The right to a jury trial is a wayside en route to other constitutional vistas. It is impossible to decide the question of the right to a jury trial without opening a host of collateral issues which are intrinsic to the operation of a jury trial system. If there is to be a right to a jury trial, how, if at all, may it be waived? How are jurors to be selected, challenged, and instructed? Upon what quantum of proof are the jurors to reach their decision? The myriad issues which must be resolved are very adequately canvassed in the Standards

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[50] Paulsen, *Juvenile Courts and the Legacy of '67*, 43 Ind. L.J. 527, 536 (1968); Welch, *Kent v. United States and In Re Gault: Two Decisions In Search of a Theory*, 19 Hastings L.J. 29, 35 (1967).

Relating to Trial by Jury proposed by the American Bar Association's Project on Minimum Standards for Criminal Justice (T.D. 1968 with amendments).

Amicus is concerned lest, in deciding the jury trial issue, this Court may unintentionally produce an effect with much more extensive ramifications than are envisioned by the right to trial by jury considered only in the abstract and without regard to its actual functioning in the context of a juvenile court. The right to a jury trial does not travel without its necessary impediimenta.[51] These may have a constitutional dimension, if the right to jury trial does so. It is not frivolous to suppose that those jurisdictions which permit a jury trial by six jurors in a juvenile court[52] will be challenged for not adhering to the more traditional and, therefore, constitutionally required jury of twelve. *DeStefano v. Woods, supra;* which raised the issue of the constitutional right to a unanimous verdict of a jury, is clear testimony that a declaration of the constitutional right to a jury trial is but an opening wedge for a flood of endless and troublesome questions, which will put the juvenile court to the test as much as they will this Court.

And then again the coming of a jury trial to the juvenile court is bound to bring the "clash and clamor"[53] of adversary proceedings which give the aura of gamesmanship which characterizes so many criminal jury trials. It may be that the informality of the juvenile court is not an unmixed blessing,[54] but it does have certain positive advantages for the juvenile. It frustrates the urge of the youth for noto-

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[51] *Bloom v. Illinois,* 391 U.S. 195, 213 (Fortas, J. concurring).

[52] Mich. Stat. Ann. 27.3178 (598.17); Okla. Stat. Ann. Tit. 10, Sec. 1110; S.D. Code (1939) 43.0331.

[53] *Dryden v. Comm., supra,* note 24.

[54] Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 Wis. L. Rev. 7, 19; *Rights and Rehabilitation in the Juvenile Courts* (Note), 67 Colum. L. Rev. 281, 284 (1967).

riety and attention.[55] It removes some portion of the stigma of criminality[56] and it softens the impact of charge, trial and disposition upon an impressionable youth.

There may be some doubt, resulting from an empirical void, as to the exact nature of the rapport between judge and juvenile, as well as the extent to which a jury trial will have a traumatic effect of any substantial duration upon the juvenile. Yet, it is reasonably clear that "tearing the 'socialized' procedure out of our [juvenile court] system is not a great leap forward . . ."[57] for the juvenile. "For children who are receiving the 'worst' of both worlds, it is no great achievement to brighten the one that may not matter as much to them."[58] And the constitutional domestication of juvenile court procedure is an empty formality unless there is provision for notice, understanding and motivation in the assertion of this new program of rights. But the accomplishment of these ends and the consequent implementation of the new rights present great problems which *amicus* suggests should not be taken lightly in determining the constitutional right of a juvenile to a jury trial.

The juvenile court, it is to be observed, is not the only quasi-criminal tribunal with the power to institutionalize persons without engaging in a trial by jury. Sex psychopath laws often have the same effect. Mental commitment procedures are well-known and frequently used illustrations of such authority to cause loss of liberty. Even in criminal proceedings, there might well be pre-trial hearings on an issue of the accused's competency to stand trial with a resulting long-term deprivation of liberty. And in the juvenile court, in dependency cases, a similar consequence often

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[55] Tappan, Juvenile Delinquency, *supra*, at 146.

[56] Rubin, Crime and Juvenile Delinquency 66 (1958).

[57] Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167, 192.

[58] Handler, *The Juvenile Court and The Adversary System*, *supra*, at 32.

follows from a jury-less proceeding. *Amicus* is concerned that a decision in this cause requiring a jury trial in the juvenile court will have a domino-like effect upon those other proceedings which entail confinement and loss of liberty. It is suggested that these consequences should not be discounted in arriving at a conclusion on the merits of the jury trial issue posed in this case.

On balance, therefore, it is submitted that the jury trial in juvenile court is not so fundamental as to warrant a holding that will have such far-reaching effects within the structure of the juvenile court and on other existing procedures in causes of an essentially parallel nature in other courts on other innumerable occasions.

III.

THE QUESTION OF THE PROSECUTOR'S DISCRETION NOT TO INSTITUTE CRIMINAL PROCEEDINGS SHOULD NOT BE DECIDED ON THIS RECORD

A. *The Question Was Not Considered Below.* In his brief on the merits appellant alleges that among the questions presented is his claim that he was denied due process under the Fourteenth Amendment because pertinent decisions of the Nebraska Supreme Court have held that prosecutors in that state have discretion as to whether they will proceed against a juvenile in the juvenile court or initiate criminal proceedings in an adult court. In this case, the prosecutor elected not to charge a seventeen-year-old boy as a criminal but instead to proceed against him in the juvenile court.

It is established that before this Court will review a decision of a state court, it must affirmatively appear in the record that the federal question pressed upon it was preserved in the highest court of the state having jurisdiction and that its decision on such issue was necessary to its determination of the cause. *Williams v. Kaiser*, 323 U.S. 471, 477; *S.W. Bell Tel. Co. v. Oklahoma*, 303 U.S. 206, 212-213; *Honeyman v. Hanan*, 300 U.S. 14, 18. It is not

enough that the claim for which review by this Court is sought was made in a state trial court, if such a contention was not preserved before the highest court of the state. *Hiawasse River Power Co. v. Carolina-Tennessee Power Co.*, 255 U.S. 341, 343-344. Examination of the record in this case, we believe, requires the conclusion that the question of the prosecutor's discretion to waive criminal proceedings in favor of proceeding against a juvenile in a juvenile court was not considered or determined by the Nebraska Supreme Court and should not be decided by this Court on the basis of the record now before it.

In the juvenile court, appellant's counsel was careful to object to the jurisdiction of that court on the grounds the proceedings there denied him a right to a jury trial allegedly guaranteed by the Sixth Amendment to the Constitution of the United States, as incorporated in the Fourteenth Amendment thereto (A. 4). No complaint or objection was voiced at that stage against the prosecutor's decision to proceed in the juvenile court, rather than commencing criminal proceedings against the appellant, as he had the option to do under the law of Nebraska. *State v. McCoy*, 145 Neb. 750, 18 N.W.2d 101 (1945); *Fugate v. Ronin*, 167 Neb. 70, 75, 91 N.W.2d 240 (1958).[59]

The last of the claims asserted in the *habeas corpus* petition which was filed in appellant's behalf in the trial court was that he was being deprived of his liberty under the Fourteenth Amendment of the Constitution because "his right to a jury trial and the protective procedures of the criminal code" were left to the unreviewable discretion of

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[59]Counsel for the appellant also objected to the introduction in evidence in the juvenile court proceedings of an incriminating written statement which the juvenile gave to a police officer under circumstances, appellant's counsel represented to the juvenile court, in which there was no showing that the juvenile had made an intelligent waiver of counsel and where the appellant had not had an opportunity to consult with his parents (A. 12). However, the appellant did not raise the issue of this pre-trial statement in the Nebraska courts (A. 18-19). Nor does he argue it in this Court.

the prosecutor to determine whether the applicant should be proceeded against in the juvenile court or tried as a criminal in an adult court (A. 19). The *habeas corpus* petition also raised the objections based on the applicant's alleged right (a) to a jury trial, and (b) to be convicted only upon the basis of evidence sufficient to convince the trier of the facts beyond a reasonable doubt (A. 18-19). The response to the petition for *habeas corpus* took issue only with appellant's claim that Section 43-206.03 of the Revised Statutes of Nebraska (1965) violated the Sixth and Fourteenth Amendments. The discretion contention was not answered (A. 20). The district court dismissed the petition for *habeas corpus* without written opinion (A. 21).

The law of Nebraska dispenses with any requirement that an appeal to the Nebraska Supreme Court be accompanied by an assignment of errors. In Nebraska, however, an appellant is required to set out in his brief with "particularity each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; . . ." Section 25-1919, Rev. Stats. of Neb. (1964). The Nebraska Supreme Court also requires that the brief for the appellant contain a specific statement of the errors complained of. *Mauder v. State*, 97 Neb. 380, 149 N.W. 800 (1914). Errors relied on but not definitely set out or discussed in an appellant's brief are not ordinarily considered. *Packard v. DeVoe*, 97 Neb. 740, 144 N.W. 813 (1913); *First National Bank v. Hedgecock*, 87 Neb. 220, 127 N.W. 171 (1910).

In the eighteen page brief which he filed in the Supreme Court of Nebraska, the appellant assigned as error on the part of the trial court its failure in "not finding that Sec. 43-206.03. Rev. Stat. of Neb. (1965) valid under the Sixth and Fourteenth Amendments . . . ."[60] However, the prosecutor's discretion to proceed against a juvenile either in a criminal court or in the juvenile court is not conferred by

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[60]Brief for the Appellant, Supreme Court of Nebraska, p. 2.

virtue of the statutory provision thus cited. Subsequently, in his Nebraska Supreme Court brief the appellant devoted a single paragraph to his contention that due process was offended by an unreviewable option exercised by the prosecutor in proceeding against him as a juvenile rather than charging him under the criminal code of Nebraska.[61] In his brief below, the appellant did not identify any particular Nebraska statutory provision, other than Sec. 43-206.03, Rev. Stat. Supp. (1965), which is alleged to violate the due process clause of the Fourteenth Amendment. However, he did cite one Nebraska decision, *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958), which, among others, has upheld the concurrent jurisdiction possessed by the juvenile courts and the regular criminal courts of Nebraska following alleged violations of the criminal law committed by juveniles in that state. The question, apparently, also was referred to during the course of oral argument, at least tangentially, by one of the judges of the Nebraska Supreme Court.[62]

The Nebraska Supreme Court did not pass upon appellant's challenge to the prosecutor's election to proceed against him in a juvenile, rather than in an adult criminal, court. The *per curiam* opinion of the court mentions only appellant's contentions that he was entitled to a jury trial and that he was entitled to application of the "beyond a reasonable doubt" rule in connection with his adjudication as a delinquent (A. 23). Similarly, the four judges who agreed with the appellant's claim of a right to a jury trial and to adjudication under the "reasonable doubt" standard did not take up any issue turning upon the prosecutor's discretion not to initiate a criminal prosecution against a juvenile (A. 23). In their opinion, the four who agreed with the appellant mentioned only in passing the permission which exists under Nebraska law by which a county attorney may determine "whether to file an action under the

[61] *Id.*, at 15.

[62] Brief for Appellant, filed in this Court, p. 30.

general criminal laws of the state, or a delinquency proceeding in the juvenile court" (A. 26). The three judges who voted to affirm the trial court's denial of a writ of *habeas corpus* also confined discussion and decision exclusively to the jury trial and standard of proof questions. They neglected even bare reference to any contention that the prosecutor's discretion to institute a juvenile proceeding rather than undertake a criminal trial violated the Fourteenth Amendment of the Federal Constitution (A. 32).

The above summary of the record below suggests that any federal constitutional question of the prosecutor's discretion not to institute criminal proceedings in this case was not fully argued before, and certainly not considered or decided by, the Nebraska Supreme Court. As in *Beck v. Washington*, 369 U.S. 541, 553, the limited one paragraph reference to the point in appellant's brief in the court below should not suffice to require its determination in this Court, at least on the basis of the present barren record. *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477; *Herndon v. Georgia*, 295 U.S. 441. In so arguing, the *amicus* does not cling to a mere technical point of jurisdiction or procedure. As shown in the next section of this brief, any challenge to a prosecutor's discretion to waive criminal charges in favor of juvenile court proceedings transcends issues evolving out of the administration of juvenile court justice and touches much broader areas of the permissible discretion of a prosecutor to institute, to reduce, or not to prosecute, criminal proceedings generally. This Court has admonished on numerous occasions that it will not decide constitutional questions prematurely and on an inadequate record. See, *e.g., Ellis v. Dixon*, 349 U.S. 458, 462. We appeal to the judicial restraint which underlies that admonition by urging in this case that the Court refuse to take up the appellant's complaint that he has been denied due process because the prosecutor chose not to treat him as an accused criminal.

The Court has persisted in its disinclination to review questions not properly preserved or considered in the courts

below in the face of substantial claims of First Amendment rights, *Wolfe v. North Carolina*, 364 U.S. 177, 294-195, and again where rather persuasive allegations of racial discrimination have been made, *Ellis v. Dixon, supra.* A recent manifestation of the Court's reluctance to decide important constitutional questions on the basis of an incomplete or inadequate record is found in *Powell v. Texas*, 392 U.S. 514, 521. In that case, four members of this Court declined the opportunity to determine that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the punishment of a chronic alcoholic for the crime of public drunkenness. As in *Powell*, so too the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which can alone support the announcement of a possibly wide-ranging new constitutional principle. 392 U.S., at 521. The record here, for example, is completely devoid of facts or statistics regarding: the states which permit a prosecutor to waive criminal proceedings and proceed against a juvenile in a juvenile court; the number of times that such an election has been made in Nebraska, or in other states; the statutory or other extra-judicial restraints which may place checks on abuse of the prosecutor's discretion; or any demonstration, statistically or otherwise, of any alleged adverse effect on juveniles whom prosecutors elect to proceed against as alleged delinquents rather than as accused criminals. Moreover, as we suggest in the concluding section of this brief, the narrow issue of a prosecutor's discretion not to institute criminal proceedings against a juvenile brings immediately into relevant focus analogous areas of discretion to institute or not institute criminal proceedings vested in prosecutors throughout this country from the days of the common law and never before seriously challenged on a constitutional plane.[63]

Accordingly, the *amicus* urges that the Court follow in this case the course it adopted in *Mishkin v. New York*,

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[63] *Prosecutor's Discretion* (Note) 103 Penn. L.R. 1057 (1955).

383 U.S. 502, 512-514, namely, that it not consider the merits of appellant's claim that the prosecutor's discretion to prefer juvenile to criminal proceedings is constitutionally defective. Since that question, we believe, like the issue declined in the *Mishkin* case, falls within the certiorari and not the appellate jurisdiction of the Court, we respectfully suggest that notation of probable jurisdiction in this case could be treated as a grant of a writ of certiorari on the issue of prosecutor's discretion and the Court could then dismiss the writ as improvidently granted, for the reasons argued in this portion of the *amicus'* brief.

B. *The Prosecutor's Discretion Might Have Been Reviewed in the District Court.* The appellant complains that the prosecutor's decision to proceed against the appellant in the juvenile court rather than in an adult criminal court is constitutionally defective. The alleged constitutional infirmity, argues the appellant, lies in the fact that the prosecutor's discretion is not subject to judicial review. More precisely, he claims that the Due Process Clause of the Fourteenth Amendment prevents determination of the court in which proceedings are to be brought against a juvenile from being left to the "discretion of a state officer outside the judicial system."[64]

In the immediately previous section of this brief *amicus* has suggested that any issue of the prosecutor's election in this case should not be taken up by the Court on the basis of the record made below. In the next and concluding portion of its brief the Council argues that, if the issue is now ripe for determination, then the discretion exercised by the prosecutor in this case should be upheld as a discretion similar in its aspects, nature and impact to other types of discretionary authority traditionally bestowed on prosecutors throughout the state and federal systems and never seriously challenged as transgressions of due process, equal protection or of other basic guarantees afforded by either

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[64] Brief for Appellant, p. 28.

the Federal Constitution or by the constitutions of any of the states.

At this particular juncture, however, the *amicus* makes a further point, although it bears some relation to both of the contentions summarized in the previous paragraph. There is in effect in Nebraska a statute which, on its face, might have provided a right of judicial review of the prosecutor's decision in this case. Section 25-1901, Rev. Stat. of Neb. (1964), provides:

> "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or *officer exercising judicial functions*, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."[65] (Italics supplied.)

A major assumption on the part of the appellant is his contention that when the prosecutor decides in which court he intends to proceed against a juvenile, he is, in effect, exercising a judicial function.[66] *Amicus* disputes this assumption. Still, if it be true, then the Nebraska statute cited above would appear to be applicable. Under appellant's own analysis, the prosecutor in this case was an "officer exercising judicial functions" whose decision to proceed in the juvenile court, in the words of the statute, could have been "reviewed, vacated or modified by the district court," the Nebraska court of original civil and criminal jurisdiction. There is no suggestion in the record that the appellant ever attempted to invoke Sec. 25-1901, *supra*.

We have here, then, a second instance where appellant elected not to pursue avenues of direct appeal through which his interests might have been adequately protected

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[65] This statute has been construed to cover the actions of executive or administrative officials. See, *e.g.*, *Pollack v. School District*, 54 Neb. 171, 74 N.W. 393 (1898), in which a county superintendent's order changing school boundaries was held to be reviewable by petition under the statute.

[66] Brief for Appellant, p. 3.

under the law of Nebraska without resort to allegedly applicable guarantees of the Fourteenth Amendment. If the prosecutor was exercising, as appellant claims, judicial functions, his exercise of discretion here could have been reviewed by the District Court by virtue of the state statute referred to above. On the other hand, if he was not performing a judicial function but merely, as the *amicus* argues, exercising a traditional and unquestionably valid prosecutor's discretion, his decision is one not subject to judicial review. In either event, the issue of the prosecutor's discretion should be resolved against the appellant.

IV.

DUE PROCESS WAS NOT OFFENDED BY THE PROSECUTOR'S DECISION TO PROCEED AGAINST APPELLANT AS A JUVENILE RATHER THAN AS A CRIMINAL

Should the Court reach the merits of appellant's claim that the prosecutor's decision to proceed against him in the juvenile court offended due process, it will be passing upon a singularly unique contention. In the reported precedents dealing with the issue of waiver or transfer of jurisdiction between juvenile and criminal courts of which the *amicus* is aware, the challenges involved were always those attacking the alleged unconstitutionality of, or illegalities in, a procedure through which a child was made subject to adult criminal justice rather than being proceeded against in a juvenile court.[67] Such challenges are understandable. As this Court observed in the leading case on the subject, *Kent v. United States*, 383 U.S. 541, the jurisdiction vested in a juvenile

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[67] Representative federal cases are: *Kent v. United States*, 383 U.S. 541; *Harling v. United States*, 101 App. D.C. 174, 295 F.2d 161 (1961); *Black v. United States*, 122 App. D.C. 393, 355 F.2d 104 (1965); *Watkins v. United States*, 119 App. D.C. 409, 343 F.2d 278 (1964). Among the recent state court decisions are: *Solis v. Texas*, 418 S.W.2d 265 (Civ. App., 1967); *Summers v. State*, ___ Ind. ___, 230 N.E.2d 320 (1967); *Brooks v. Boles*, ___ W.Va. ___, 153 S.E.2d 526 (1967); *Templeton v. State*, 202 Kan. 89, 447 P.2d 158 (1968); *State v. Piche*, ___ Wash. ___, 442 P.2d 632 (1968).

court "confers special rights and immunities on the child." Waiver of, or transfer from, that jurisdiction in favor of trial in an adult criminal court is a "critically important" action "determining vitally important statutory rights of the juvenile."[68] This conclusion seems irrebuttable in the face of the controlling realities. As a recent commentator has said:

> ". . . In effect, waiver is a judicial determination that the child is beyond the rehabilitative philosophy of the juvenile court 'and is "critically important" for the child who may be abandoned as "incorrigible" and for the society which has thus abandoned the child.' There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court. Not only is the juvenile exposed to the probability of severe punishment, but the confidentiality and individuality of the juvenile proceeding is replaced by the publicity and the normative concepts of penal law; the child acquires a public arrest record which, even if he is acquitted, will inhibit his rehabilitation because of the opprobrium attached thereto by prospective employers; if convicted as an adult, the child may be detained well past his twenty-first birthday; he may lose certain civil rights and be disqualified for public employment. Moreover, if sent to a typical adult prison, he is likely to be subjected to physical, and even sexual, abuse by older inmates, and his chances for rehabilitation are likely to decrease significantly."[69] (Footnotes omitted.)

The Council agrees that a decision by which a child is made to stand trial in an adult criminal court is "in essence, a sentence of 'death' as a juvenile, with the subsequent pro-

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[68] 383 U.S., at 556.

[69] Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 Ind. L.J. 583, 586 (1968).

ceedings in the criminal court completing the execution."[70] In this case, however, appellant laments that he was spared such "sentence of 'death' as a juvenile." He complains because the prosecutor elected not to charge and try him as a criminal, as he had an option to do under the law of Nebraska.[71] Here, he contends that the prosecutor's decision to proceed against him as a juvenile was not subject to judicial review, an omission which appellant equates with a denial of the fundamental fairness guaranteed by the due process clause. On the other hand, appellant concedes that, if he had had a right to a jury trial in the juvenile court, an unreviewable decision on the part of the prosecutor to charge him in the criminal court would have been challenged. In that situation, appellant would assert that "a juvenile should not be deprived of the supposed dispositional advantages, including the disabilities flowing from a criminal conviction because of the prosecutor's whim."[72]

To the *amicus*, such a sophistical, "heads I win, tails you lose" approach to the issue of the prosecutor's election of jurisdiction represents a debasement of the purposes and spirit of the due process clause and the fundamental procedural rights over which it stands guard. Frankly, *amicus* believes that the appellant's paradoxical position on the point is the reflection of his counsel's judgment that he might have won the case before a jury. Perhaps so, but due process requirements are not to be stretched in order to achieve particular instances of justice or to rectify isolated instances of apparent injustice. Their strength lies in their long run, universal applicability and is diluted when due process arguments are pressed into service as substitutes for arguments or appeals attacking the sufficiency of evidence supporting a verdict—a contention which the appellant eschewed in this case when he chose to proceed by *habeas*

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[70] *Id.*, at 588.

[71] *Fugate v. Ronin*, 167 Neb. 70, 75, 91 N.W.2d 240 (1958).

[72] Brief for Appellant, p. 30.

corpus rather than by direct appeal to the District Court and the Supreme Court of Nebraska as he could have done. Hard cases still make bad law. And nowhere more so than in the area of constitutional law, where their adverse consequences are so much more difficult to eliminate or cure by action of the people's representatives.

Theory apart, appellant was not constitutionally prejudiced by the prosecutor's decision to proceed against him in the juvenile court. If, on the one hand, this Court should hold that he was entitled to a jury trial in the juvenile court, appellant surely would concede that a decision to proceed against him in that court would have been acceptable to him.[73] If, on the other hand, appellant had no constitutional right to a jury trial in a juvenile court, the exercise of discretion by the prosecutor in this case would appear to fall well within the categories of prosecutor or executive discretion universally upheld by American courts even before the nation was founded and well recognized at common law. *United States v. Cox*, 342 F.2d 167, 192 (C.A. 5, 1965); *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill., 1945).[74]

A number of states, of which Nebraska is one, give concurrent jurisdiction over juveniles to their criminal and juvenile courts, at least as to those over a certain age.[75] In such states, a prosecutor has the discretion to choose in which court to proceed. The Attorney General of the United States is given analogous discretionary authority by the

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[73] Brief for Appellant, p. 30.

[74] *Prosecutor's Discretion* (Note), 103 Penn. L.R. 1057 (1955); Baker and DeLong, *The Prosecuting Attorney–Powers and Duties in Criminal Prosecutions*, 24 J. Criminal Law & Criminology 1025 (1934).

[75] Among these states are: Alabama–Ala. Code, Tit. 13, ¶ 365 (1958); Illinois–Smith-Hurd, Ill. Rev. Stat. Ch. 37, ¶ 702-7 Supp. (1965); Iowa–*State v. Steuve*, ___ Ia. ___, 150 N.W.2d 597 (1967); and Georgia–*Jackson v. Balkcom*, 210 Ga. 412, 80 S.E.2d 319 (1954).

Federal Juvenile Delinquency Act. Under that statute, a juvenile charged with a violation of the law of the United States, with certain exceptions, "shall be proceeded against as a juvenile delinquent if he consents to such prosecution, unless the Attorney General *in his discretion* has expressly directed otherwise." (Italics supplied.)[76] Although one recent commentator implies doubt about the constitutionality of the discretion vested in the Attorney General by the Federal Juvenile Delinquency Act,[77] his "final and absolute" authority to do so has been sustained in several cases. *Raimirez v. United States*, 238 F. Supp. 763, 764 (S.D. N.Y., 1965); *United States v. Verra*, 203 F. Supp. 87, 91 (S.D. N.Y., 1962).[78]

The purpose of the Federal Juvenile Delinquency Act in removing young people from criminal court proceedings, unless the Attorney General expressly directs otherwise, was to "avoid prosecution of juveniles as criminals." *Cotton v. United States*, 355 F.2d 480, 481 (C.A. 10, 1966). The same purpose underlies the Nebraska statute challenged on this appeal. *Miller v. Bryant*, 94 Neb. 754, 144 N.W. 804 (1913). The *amicus* concedes *arguendo* that a prosecutor's unreviewable decision to try a juvenile as a criminal, thus departing from the basic purpose of juvenile court statutes throughout the country, might give rise to constitutional difficulties if this Court's opinion in *Kent v. United States*, 383 U.S. 541, is read in a broad light. In the instant case, however, the prosecutor's decision achieved a result in accordance with the major purpose or tenet of the Nebraska juvenile court statute. No procedural rights of the appellant were violated by the prosecutor's decision, unless it can be successfully maintained that the rationale of this Court's decision in *Kent* required that the prosecutor first have

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[76] 52 Stat. 557 (1948); 18 U.S.C. 5032 (1969).

[77] *Schornhorst, supra* note 69, p. 598.

[78] See also *Barnes v. Pescor*, 68 F. Supp. 127, 128 (W.D. Mo., 1946), appeal dismissed, 158 F.2d 800 (C.C.A. 8, 1946).

held an adversarial hearing before deciding not to charge a child as a criminal.

Kent v. United States, supra, is distinguishable from this case in several significant particulars. First, as already noted, we are dealing with a situation in which a juvenile was not charged and tried in a criminal court. In *Kent,* of course, precisely the opposite was the case. The decision which was attacked there deprived a child of the special protections otherwise afforded him by the District of Columbia juvenile court statute. Secondly, although the cases[79] and the commentators[80] disagree, the more persuasive view would seem to be, as Dean Paulsen has colorfully concluded, that *Kent* did "not actually hurl constitutional thunderbolts at the nation's juvenile courts . . . ."[81] In *Kent,* this Court construed a waiver provision of the District of Columbia Code. In doing so, Mr. Justice Fortas was careful to state that: "The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia provide an adequate basis for decision of this case, and we go no further." 383 U.S., at 556.[82] However, even if *Kent* must be taken as a case having constitutional overtones, if not of constitutional dimension, an important

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[79]Illustrative cases finding no constitutional mandate in *Kent* are: *State v. Acuna,* 78 N.M. 119, 428 P.2d 658, 659 (1967); *Cradle v. Peyton,* 208 Va. 243, 156 S.E.2d 874 (1967); and *State v. Hance,* 2 Md. App. 162, 233 A.2d 326, 329 (1967). To the contrary are: *Madera v. Board of Education,* 267 F. Supp. 356, 370 (S.D.N.Y., 1967); *Summers v. State,* ___ Ind. ___, 230 N.E.2d 320 (1967); *State v. Owens,* 197 Ka. 212, 416 P.2d 259 (1966); and *Dillenburg v. Maxwell,* 70 Wash. 2d 325, 422 P.2d 783 (1967).

[80]Compare Dean Paulsen's analysis as set out in *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 Supreme Court Review, p. 167, with Professor Schornhorst's views, *supra* note 69.

[81]Paulsen, *supra* note 80, p. 186.

[82]See also *In Re Gault,* 387 U.S. 1, 66; *A Due Process Dilemma: Juries for Juveniles* (Note), 45 N.Dak. L.R. 251, 253 (1967).

distinction between it and this case remains. In *Kent*, the Court was construing a statute that conferred authority to waive juvenile jurisdiction on a court, authority which permitted the court "after full investigation" to forego its "exclusive jurisdiction."[83] The statute vested what reasonably must be characterized as a quasi-judicial function in a judicial tribunal. It has long been the law that where a quasi-judicial proceeding, including a hearing, either expressly provided for or fairly implied, is required by statute as a prelude to an order or adjudication affecting legal rights, even though there may have been no constitutional requirement to provide such proceeding or hearing in the first instance, the procedures observed must be fair.[84] Nebraska, however, has not vested any authority in its juvenile courts to waive jurisdiction. It allows juvenile court jurisdiction to exist concurrently with that of the regular criminal courts. Election of the jurisdiction in which to proceed against a juvenile has not been made a judicial function or responsibility; it remains an executive or prosecutor's obligation. Like the discretion possessed by prosecutors in other areas of the criminal law, it is a responsibility which certainly can be abused and misused. However, the remedy, as in other cases of abuse of the prosecution function, lies with the people who elect the prosecutor or who elect the state officer who appoints him. It has not been entrusted to the judicial power.[85]

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[83] 11 D.C. Code 907, 914 (1961); now 11 D.C. Code 1531, 1533 (Supp., 1965).

[84] *Morgan v. United States*, 304 U.S. 1, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123; *Greene v. McElroy*, 360 U.S. 474.

[85] As previously argued in this brief, however, there is a Nebraska statute which would seem to afford a statutory right of judicial review of the prosecutor's decision in electing in which court to proceed against the juvenile. *Supra*, p. 47. Such judicial review rests on a statutory basis; it is not a constitutional requirement.

The *amicus* applauds the salutary effects of this Court's decision in *Kent v. United States, supra.* That decision insists that before a juvenile court surrenders its preferred jurisdiction over juveniles and permits a child to be accused and tried as a criminal, it must adhere to procedures that observe minimum standards of "fundamental fairness." The Council does argue, however, that it would be an unwarranted and invidious extension of the doctrine of Kent to maintain that it requires exercise of a prosecutor's discretion in choosing to proceed against a child in a juvenile court either to be preceded by some type of a quasi-judicial or adversarial hearing or else to be subject to judicial review. Apart from its effect on the states where juvenile and criminal court jurisdiction exist concurrently,[86] it might cast into doubt other, even more critical, categories of prosecutor's discretion traditionally thought to be immune from judicial scrutiny, except as provided by statute. Here, *inter alia*, come immediately to mind the prosecutor's duty: to investigate crime and to initiate prosecution against suspected individuals;[87] to present cases to the grand jury; to file an information charging a person with a crime; to reduce charges when justified; and, frequently, to discontinue or *nolle pros* a charge previously brought.[88] At least one dis-

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[86]See note 75, *supra.*

[87]Courts generally refuse to order a prosecutor to initiate a prosecution on the ground that it is a discretionary act which may not be compelled by mandamus. *Leone v. Fanelli,* 194 Misc. 826, 87 N.Y. Supp. 2d 1950 (Sup. Ct., 1949); *Murphy v. Sumners,* 54 Tex. Crim. 369, 112 S.W. 1070 (1908); *Graham v. Gaither,* 140 Md. 330, 117 A. 858 (1922). Nor has Congress ever challenged acceptance of the same notion with respect to the authority or discretion of federal prosecutors. Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion,* 13 Law & Contem. Prob. 64, 83 (1948).

[88]At common law, an attorney general had absolute power to dismiss a prosecution on his own official responsibility. Clark, Criminal Procedure 122 (2d Ed., 1918); *People v. Newcomber,* 284 Ill. 315, 120 N.E. 244 (1918). The prosecutor's authority to *nolle pros* a case has been restricted or modified by statute in a number of

tinguished law professor is concerned lest *Kent* be taken as a portent looking "toward such radical innovation as to implant an adversary hearing in all official decision-making that may work 'a result of tremendous consequences' to individuals in respect to their freedom . . . ."[89] In contrast, another nationally known legal scholar has just written a book urging precisely such a result.[90]

This *amicus* is reasonably confident that the *Kent* decision was not intended to cast doubt on other types of discretion traditionally exercised by prosecutors in all the states and in the federal system. For that reason, we will not dwell upon the appalling consequences should *amicus'* prediction prove to be wrong. Mr. Justice Jackson whimsically but accurately once remarked that in the United States we believe "in government by lawsuit." Nevertheless, there are limits. The machinery of government simply cannot function properly if the operations of all, or even of many, of its decision making mechanisms must be subject to the condition precedent of holding a judicial type hearing or receiving judicial approval. There is a practical as well as a philosophical basis for the separation of powers doctrine. As Mr. Justice Holmes reminds us:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[91]

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states. Prosecutor's Discretion (Note), 103 Pa. L.R. 1057, 1067 (1955).

[89]Paulsen, *supra*, at 183.

[90]Davis, Discretionary Justice, A Preliminary Inquiry (La. State Univ. Press, 1969). See especially Chs. VI and VII of Professor Davis's provocative book.

[91]*Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270.

CONCLUSION

For the reasons stated in this brief, the *amicus* respectfully suggests that the Court vacate its order noting probable jurisdiction in this case and grant appellee's motion to dismiss the appeal for want of a substantial federal question. Alternatively, it urges that the Court affirm the *per curiam* decision of the Supreme Court of Nebraska.

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